STATE OF MINNESOTA
IN COURT OF APPEALS
A09-299

Gale Rachuy,
Appellant,

vs.

Anchor Bank,
Respondent.

Filed October 27, 2009
Affirmed; motion granted
Halbrooks, Judge

Hennepin County District Court
File No. 27-CV-08-10793

Gale A. Rachuy, 519 North 22nd Avenue West, Duluth, MN 55806 (pro se appellant)

Alan I. Silver, Jessica Schulte Williams, Bassford Remele, P.A., 33 South 6th Street, Suite 3800, Minneapolis, MN 55402 (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Ross, Judge; and Johnson, Judge.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

On appeal from summary judgment, appellant argues that his civil claims were not precluded by collateral estoppel based on his criminal convictions, which have since been reversed, and that judgment as a matter of law was not proper on the merits of his claims.

Appellant also argues that the district court abused its discretion in ordering him to return a confidential document that respondent inadvertently sent him during discovery and to pay attorney fees respondent incurred in seeking the return of the document. Respondent moved to strike the document from appellant's appendix. We grant respondent's motion and affirm.

FACTS

Appellant Gale Rachuy opened a checking account in October 2005 with respondent Anchor Bank and deposited two checks that were later determined to be counterfeit. Appellant then wrote checks and made withdrawals against his account. Days later, the funds from the counterfeit checks were withdrawn from appellant's account, resulting in a negative balance. On November 17, 2005, respondent learned of appellant's criminal history, which included 24 prior felony convictions and multiple convictions of theft by swindle. *See State v. Rachuy*, 495 N.W.2d 6, 8 (Minn. App. 1993) (describing appellant's criminal history), *aff'd as modified*, 502 N.W.2d 51 (Minn. 1993), *as amended* (Minn. July 8, 1993). On that day, respondent put appellant's account on "restricted status," meaning that no deposits or withdrawals were allowed.

Respondent treated appellant's account as closed as of November 28, 2005. Anyone who inquired about checks written from the account was told either that there were not sufficient funds in the account or that the account was closed, and all checks written against appellant's account were returned for insufficient funds. Because respondent's system required that an account have a zero balance in order to be closed

and appellant's account had a negative balance, appellant's account was not formally closed at that time.

Also on November 28, 2005, respondent received a wire transfer directed to appellant's account in the amount of $22,500 from James Tickler. Tickler had agreed to purchase $45,000 worth of firewood from appellant, who had instructed Tickler to wire one-half of the purchase price to appellant's account before delivery. Days later, Tickler asked his bank to reverse the wire transfer; after failing in his attempts to reach the trucker who appellant told him would be hauling the wood, Tickler suspected that appellant never intended to deliver the firewood. Respondent honored the request from Tickler's bank to reverse the transfer but retained approximately $3,400 to cover the deficit balance in appellant's account. Respondent then formally closed appellant's account.

Respondent reported appellant's deposit of the counterfeit checks to law enforcement. As a result, appellant was charged with and convicted of one count of offering a forged check in the amount of more than $35,000 in violation of Minn. Stat. § 609.631, subds. 3, 4(1) (2004), and two counts of offering a forged check in the amount of more than $2,500 in violation of Minn. Stat. § 609.631, subds. 3, 4(2) (2004).

Appellant, acting pro se, served a complaint upon respondent in January 2007. The complaint contained a number of factual allegations pertaining to respondent's (1) report to law enforcement, (2) reversal of the wire transfer, and (3) refusal to honor appellant's checks. But the complaint did not explicitly state any legal claims.

In the course of discovery, respondent inadvertently provided appellant with a copy of the suspicious activity report (SAR) that respondent had submitted to the United States Treasury Department's Federal Crimes Enforcement Division. Respondent notified the Office of the Comptroller of the Currency (OCC), also a part of the Treasury Department, of this fact, and the OCC informed respondent that the SAR was confidential. Both respondent and the OCC sent multiple requests to appellant to return the SAR, but appellant consistently refused to honor those requests.

The district court construed appellant's complaint as including claims of defamation and wrongful dishonor of checks. The district court ruled that appellant's claims, which arose from the same facts on which appellant was convicted, were barred by collateral estoppel and also failed as a matter of law on the merits. The district court granted summary judgment. The district court also ordered appellant to return the SAR and to pay respondent's attorney fees associated with the SAR motion. This appeal follows.

D E C I S I O N

After this appeal was briefed, this court reversed appellant's criminal convictions and remanded on the ground that his right to counsel was not vindicated. *State v. Rachuy*, No. A07-2266, 2009 WL 1851384, at *6 (Minn. App. June 30, 2009). A judgment that has been reversed is no longer effective for collateral estoppel purposes. *Wilcox Trux, Inc. v. Rosenberger*, 169 Minn. 39, 43, 209 N.W. 308, 310 (1926). Because appellant's criminal convictions have been reversed, collateral estoppel is no longer a

proper basis for summary judgment in this matter, and we therefore proceed to evaluate appellant's claims on their merits.

Summary judgment is appropriate only when no genuine issues of material fact exist and either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. Appellant's claim of defamation was based on respondent's reports of appellant's suspicious activity to law enforcement. But these claims are precluded by federal law. The Annunzio-Wylie Anti-Money Laundering Act, 31 U.S.C. § 5318(g)(3) (2006), provides that "[a]ny financial institution that makes a voluntary disclosure of any possible violation of law or regulation" is immune from liability for such disclosure. Appellant's contention that respondent lacked good faith in reporting to law enforcement is irrelevant because 31 U.S.C. § 5318(g)(3) does not contain a good-faith requirement. *See, e.g., Lee v. Bankers Trust Co.,* 166 F.3d 540, 544-45 (2d Cir. 1999) (describing the act's immunity provision as "an unqualified privilege," which "does not limit protection to disclosures based on a good faith belief that a violation has occurred").

Appellant's claim for wrongful dishonor of checks relies on his assertion that respondent did not act lawfully in returning the wire transfer. The execution of wire transfers is governed by article 4A, part 4 of the Uniform Commercial Code (UCC). *See* Minn. Stat. §§ 336.4A-401 to .4A-406 (2008). Generally, a bank that accepts a wire transfer of funds directed to a beneficiary's account is obliged to pay those funds to the beneficiary. Minn. Stat. § 336.4A-404. While section 336.4A-404 provides that the beneficiary of a wire transfer may not recover damages from a bank for its refusal to pay the funds to the beneficiary if "the bank proves that it did not pay because of a reasonable

doubt concerning the right of the beneficiary to payment," *id.*, this provision does not apply when the reasonable doubt arises from an allegation by the originator of the transfer "that the beneficiary is not entitled to payment because of fraud against the originator or a breach of contract relating to the obligation." Minn. Stat. Ann. § 336.4A-404 U.C.C. cmt. para. 3 (West 2002).

But the UCC "must be liberally construed and applied." Minn. Stat. § 336.1-103(a) (2008). When respondent accepted the wire transfer, appellant's account was on "restricted status" based on the bank's reasonable suspicions about appellant's activities and was therefore ineligible to receive deposits at that time. The account was closed shortly thereafter. On this record, we conclude that respondent acted lawfully in returning the wire transfer to Tickler and that appellant may not recover damages from respondent as a result. Therefore, appellant's claim of wrongful dishonor of checks fails as a matter of law.[1]

Appellant also contends that the district court erred when it ordered appellant to return the SAR and awarded respondent $999 in attorney fees. A district court "has wide discretion to issue discovery orders and, absent clear abuse of that discretion, normally its order with respect thereto will not be disturbed." *Shetka v. Kueppers, Kueppers, Von*

[1] Appellant argues in favor of several other claims that he raised in his amended complaint. Appellant's motions for leave to amend his complaint were denied by the district court, and appellant does not argue on appeal that the district court abused its discretion in denying his motions. A party's failure to argue an issue in their appellate brief generally constitutes waiver of that issue on appeal. *See DLH, Inc. v. Russ*, 544 N.W.2d 326, 330 (Minn. App. 1996) (ruling that when a party failed to argue in its brief that the denial of the motion to amend the complaint was improper, the issue was waived on appeal), *aff'd*, 566 N.W.2d 60 (1997). Therefore, these claims are not properly before this court.

Feldt & Salmen, 454 N.W.2d 916, 921 (Minn. 1990). Additionally, "[t]he choice of sanctions under Minn. R. Civ. P. 37.02(b) for failure to comply with discovery is within the trial court's discretion." *Przymus v. Comm'r of Pub. Safety*, 488 N.W.2d 829, 832 (Minn. App. 1992), *review denied* (Minn. Sept. 15, 1992). Respondent maintains that the SAR is a confidential document and therefore has moved to strike that portion of appellant's confidential appendix that includes a copy of the SAR.

The Annunzio-Wylie Anti-Money Laundering Act provides that the fact that a report was made is confidential, 31 U.S.C. § 5318(g)(2), and 12 C.F.R. § 21.11(k) (2007) further provides that the SAR document, itself, is confidential. The confidentiality of the SAR is unwaivable and may not be defeated by the court. *See, e.g.*, *Whitney Nat'l Bank v. Karam*, 306 F. Supp. 2d 678, 682 (S.D. Tex. 2004) ("Title 31 U.S.C. § 5318(g), as implemented by 12 C.F.R. § 21.11(k), creates an unqualified discovery and evidentiary privilege that courts have held cannot be waived."); *Weil v. Long Island Sav. Bank*, 195 F. Supp. 2d 383, 389 (E.D.N.Y. 2001) (holding that SARs cannot be disclosed, "even in the context of discovery in a civil lawsuit"); *Int'l Bank of Miami, N.A. v. Shinitzky*, 849 So. 2d 1188, 1192 (Fla. Dist. Ct. App. 2003) (concluding that a SAR remained a confidential document even though it had already been disseminated to other parties). Accordingly, we grant respondent's motion to strike pages 1-5 of appellant's confidential appendix, which includes a copy of the SAR.

We also conclude that the district court did not abuse its discretion in granting respondent's motion to require appellant to return the SAR under Minn. R. Civ. P. 37.01, which "applies to motions to compel parties to produce documents and motions to

compel nonparties to attend depositions." *Bowman v. Bowman*, 493 N.W.2d 141, 145 (Minn. App. 1992). When, as here, a rule 37.01 motion is granted, the court may require the party whose conduct necessitated the motion to pay "the reasonable expenses incurred in making the motion, including attorney fees." Minn. R. Civ. P. 37.01(d)(1). Attorney fees are a matter of the district court's discretion and reviewed only for an abuse of discretion. *Giuliani v. Stuart Corp.*, 512 N.W.2d 589, 596 (Minn. App. 1994). The district court acted within its discretion in awarding respondent $999 in attorney fees.

Affirmed; motion granted.